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Equal Status Act 2000

Equality Officer Decision DEC-S2002-019 - 020

**Mrs. Nora Quilligan &
Mrs. Margaret O'Brien**
(Represented by O'Flynn Exhams & Partners)

V

The Licensee, The Green Bar
(Lees Solicitors)

File Ref: ES/2001/67 & 68

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Summary of Decision DEC-S2002-019 - 020
Mrs. Nora Quilligan & Mrs. Margaret O'Brien
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V.

The Licensee, The Green Bar

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Key words

Equal Status Act, 2000 - Direct discrimination, section 3(1) - Membership of the Traveller community, Section 3(2)(i) - Supply of goods and services, Section 5(1) - service in pubs, prima facie case - Risk of criminal or disorderly conduct, Section 15(1), - Action taken in good faith, Section 15(2).

Dispute

The dispute concerns a claim by Mrs. Nora Quilligan and Mrs. Margaret O'Brien that they

were discriminated against by the Green Bar on the Traveller community ground in terms of Sections 3(1)(a), and 3(2)(i) of the Equal Status Act, 2000, in that they were not provided with a service which is generally available to the public contrary to Section 5(1) of that Act.

Background

The complainants' case is that they entered the respondent's bar on 4 January 2001 and ordered two drinks, but they were refused service by the respondent and were given no reason. They submitted that the respondent was rude to them and they believe that the refusal of service was due to the fact that they are members of the Traveller community. The respondent rejected the complainants argument that they were discriminated against on the grounds they are Travellers and submitted that when the complainants entered his pub that they did not 'act normally' and for this reason he refused service. In addition Travellers had caused trouble in the town of Drumcollogher, during a festival in July, 2000, he believed when the complainants visited his pub on 4 January, 2001 that they had been involved in that riot and that he was entitled on those grounds to refuse service and consequently no discrimination occurred.

Conclusions of the Equality Officer

The Equality Officer found that the complainants established a prima facie case of discrimination. She was not satisfied from the evidence that the respondent produced a valid reason for holding the belief that the complainants had previously been involved in a riot. Neither was she satisfied that the respondent's belief that the complainants did not act or behave in a normal way, when they entered the bar, was justified by the evidence given in relation to the night in question. The Equality Officer found that the respondent did not succeed in rebutting the inference of discrimination raised by the complainants and concluded that the only reason the complainants were refused service was because they are members of the Traveller community.

Decision

The Equality Officer found that the Green Bar unlawfully discriminated against Mrs. Nora

Quilligan and Mrs. Margaret O'Brien in terms of Sections 3(1)(a), and 3(2)(i) of the Equal Status Act, 2000, and contrary to Section 5(1) of that Act. She awarded them €2,000 each to compensate them for the distress and embarrassment suffered as well as the loss of the amenity to them. The Equality Officer also ordered the respondent to put in place a code of practice which should include the rules which apply to all customers seeking service, the code of behaviour expected from customers and the sanctions which may apply in the event of a breach of the code. She further ordered that the respondent place a sign in the bar stating his commitment to treating people in accordance with the terms of the Equal Status Act, 2000.

Delegation under Equal Status Act, 2000

The complainant referred a claim to the Director of Equality Investigations on 25 April, 2001 under the Equal Status Act 2000. In accordance with her powers under section 75 of the Employment Equality Act 1998 and under the Equal Status Act 2000, the Director then delegated the case to Marian Duffy, an Equality Officer, for

investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part III of the Equal Status Act, 2000.

1 Dispute

1.1 This dispute concerns a claim by Mrs. Nora Quilligan and Mrs. Margaret O'Brien that they were discriminated against by the Licensee of the Green Bar contrary to the Equal Status Act, 2000, on the grounds that they are members of the Traveller community. The complainants allege that the respondent discriminated against them in terms of Section 3(1)(a), and 3(2)(i) of the Equal Status Act, 2000.

2 Background

2.1 The complainants allege that they were discriminated against by the respondent contrary to the Equal Status Act, 2000 when they were refused service in the respondent's bar on 4 January, 2001. The complainants contend this occurred because they are members of the Traveller community. The respondents case is that when the complainants entered his pub they did not act normally and for this reason he refused service. In addition Travellers had caused trouble in the town of Drumcollogher, during a festival in July, 2000. He believed when the complainants visited his pub on 4 January, 2001, that they had been involved in that riot and that he was entitled on those grounds to refuse service and consequently no discrimination occurred.

3 Summary of the Complainants' case

3.1 The complainants, who are sister-in-laws, are Travellers, Mrs. Quilligan lives in Cork city

and Mrs.O'Brien lives in Newcastlewest. They stated the following in evidence:

- Mrs. O'Brien went to Cork city on 4 January, 2001 do some shopping in the sales and then visited Mrs.Quilligan. As she had a lot of shopping Mrs. Quilligan offered to drive her home.
- On the way they decided to have a drink and stopped outside The Green Bar in Drumcollogher. They parked in front of the bar and went in. Mrs. Quilligan who does not drink ordered an orange for herself and a glass of Carling for Mrs. O'Brien.

- They said that Mr. Liam Leahy, proprietor, looked at them and then turned away. He kept looking at the television and ignored their order. They repeated the order and Mr. Leahy said sorry I am not serving you. Mrs. Quilligan asked for the reason and Mr. Leahy told her he didn't have to give her an explanation. Mrs. Quilligan then told him that he was breaking the law by refusing to serve them. Mr. Leahy said that he was well aware of the law.
- They asked to use the public telephone, but Mr. Leahy refused permission and said that there were two telephones across the street. He also refused to give them change for the telephone or to give them the name of the bar. There was one other customer in the bar having a drink and he also refused to tell Mrs. Quilligan the name of the pub.
- The complainants left the pub and reported the incident to the Gardaí in Newcastlewest.
- Concerning the allegation that they were part of a group which took part in a riot in a pub in Drumcollogher during a festival, the complainants said that they heard of the festival but had never been at it. They said that they did not know of the riot and Mr. Leahy did not mention it to them. They said that they never had been in the Green Bar before.
- The complainants were not aware if other Travellers were served in the pub. They said that Mr. Leahy was well aware they were Travellers. He was rude to them and didn't even look at them when he spoke to them.
- Having heard the respondent's case the complainants solicitor submitted that the reason given by the respondent for refusing service related mainly related to the posture of the complainants when they entered the pub and that this argument does not hold weight. He further submitted that the respondent had an apprehension about the festival incident and as soon as he realised the complainants were members of the Traveller Community, he was not going to serve them.

4 Summary of the Respondent's case

4.1 Mr. Leahy stated the following:

- There was a festival in July, 2000 called the Cahirmee Horse fair. It is held both in the towns of Buttevant and Drumcollogher. In Drumcollogher, where his pub is situated, there was a mini riot involving a group of Travellers. Four Travellers came into Mr. Leahy's pub and there were others outside the door on mobile telephones.

He refused to serve them and they went next door to another pub. After about an hour a fight developed and the Gardaí were called to the pub next door. Mr. Leahy believed that there was a threat to his pub and he closed it.

- Mr. Leahy said that he couldn't say if the complainants were amongst the group fighting but only male Travellers came into his pub.
- The complainants came into Mr. Leahy's pub on 4 January, 2001, they asked for a glass of Guinness and he refused to serve them. He refused them because when they came in the door of his pub, they didn't act as normal customers and they hesitated before going to the counter. They didn't look "normal" to Mr. Leahy. Normally customers would come in together and one would go to the counter to get the drinks and the other would sit down. In this case they hesitated and both went slowly to the counter.
- He said that he had long experience in the bar trade has been in it since he was in his teens as it is a family owned business and he knows when customers are acting unusually or out of the ordinary. He said that he made this decision because they did not behave like other customers and they were different.
- Mr. Leahy also said that he refused to serve them because he thought they were involved in the riot, he became nervous as he thought that there were other people outside the door and the same would happen as happened at the July festival.
- He refused to give them change for the telephone as he did not feel obliged to do so, but he told them they could use it. One of the complainants went outside and the other went up to one of his customers and asked him if he was asked questions before he was served and said "I bet you were served". Mr. Leahy told her not to interfere with his customers as it was none of her business. Mrs. Quilligan then used the telephone and both of them left.
- In response to questions at the hearing Mr. Leahy said what happened in July influenced his decision not to serve the complainants. He believed the same thing would happen as happened in July and he was apprehensive that there were others outside the door. In response to a further question he said that the complainants did not look normal to him he believed that they were not "normal people".
- Mr. Leahy's representative submitted that he exercised correct judgment in refusing the complainants because his perceptions concerning unruly behaviour were heightened following the festival incident in July 2000. The complainants did not

present themselves in the bar on 4 January in an acceptable fashion and Mr. Leahy believed there was a threat of unruly behaviour.

5 Conclusions of Equality Officer

5.1 The matter referred for investigation turns upon whether or not the complainants were directly discriminated against contrary to Section 3(1)(a) and 3(2)(i) of the Equal Status Act and in terms of Section 5 (1) of that Act. In reaching my decision I have taken into account all the submissions, both oral and written, made to me by the parties in the course of my investigation into the complaint.

Section 3(1)(a) provides, inter alia, that discrimination shall be taken to occur where: *On any of the grounds specified... (in this case the Traveller community ground).... A person is treated less favourably than another person is, has been or would be treated.*

Section 3(2)(i) provides that: *As between any two persons, the discriminatory grounds ... are ...*

that one is a member of the Traveller community and the other is not.

Section 5(1) of the Act provides that:

“A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.”

5.2 Prima Facie Case

A person making an allegation of discrimination under the Equal Status Act, 2000 must first demonstrate that a *prima facie* case of discrimination exists. I have identified the three key elements the complainants must show in order to establish a prima facie case:

- are the complainants covered by the ground? (in this case are they members of the Traveller community?)

-in what circumstances were the complainants refused service by the respondent on 4 January, 2001.

-evidence that the treatment received by the complainants was less favourable than the treatment someone, not covered by that ground, would have received in similar circumstances.

If and when those elements are established, the burden of proof shifts to the respondent, meaning that the difference in treatment is assumed to be discriminatory on the relevant ground. In such cases it is not necessary for the complainants to prove that there is a link between the difference in treatment and the membership of the ground, instead the respondent has to prove that there is not. If they succeed in establishing prima facie evidence, the burden of proof then shifts to the respondent to rebut the inference of discrimination.

Essentially this is the approach provided for in the Burden of Proof Directive (Council Directive 97/80/EC). In adopting this approach I am conscious that the Directive is not directly applicable to the complaints in hand under the Equal Status Act, 2000, but I consider that the Directive has persuasive effect in discrimination law. It is notable that the Labour Court and Equality Officers applied the practice of shifting the burden of proof in discrimination cases long before any European Community caselaw required them to do so (as far back as 1983 (*Bailieborough Community School v Carroll*, DEE 4/1983 Labour Court) and 1986 (Equality Officer: *Gibney*), and that this was a consistent practice across a spectrum of cases¹. The European Court of Justice caselaw did not address the issue of the shift in the burden of proof for the first time until the *Danfoss*² and *Enderby*³ cases so this was not a practice operated purely to implement Community law. It seems to represent an indigenous development in Irish discrimination law, which was in advance of Community law. There is no reason why it should be limited to employment discrimination or to the gender ground.

The practice of shifting the burden of proof in discrimination cases was also applied in very clear terms by the Supreme Court in *Nathan v Bailey Gibson*⁴ and referred to by

¹ *Curtin, Deirdre, Irish Employment Equality Law, 1989, P. 222 et seq.*

² *Danfoss Case no. C-109/88*

³ *Enderby v Frenchay Health Authority and Secretary of State for Health C-127/92*

⁴ *Nathan v. Bailey Gibson [1998] 2 I.R. 162*

the High Court in *Conlon v University of Limerick*.⁵ In *Nathan v Bailey Gibson* the Supreme Court stated:

“In such a case the worker is not required, in the first instance, to prove a causal connection between the practice complained of and the sex of the complainant. It is sufficient for him or her to show that the practice complained of bears significantly more heavily on members of the complainant's sex than on members of the other sex. At that stage the complainant has established a prima facie case of discrimination and the onus of proof shifts to the employer to show that the practice complained of is based on objectively verifiable factors which have no relation to the complainant's sex.”

While these were both indirect discrimination cases, it seems that the principle should by logical extension apply to direct discrimination cases if it applies to indirect discrimination cases.

In considering what constitutes a prima facie case, I have examined definitions from other sources. In *Dublin Corporation v Gibney (EE5/1986)* prima facie evidence is defined as: *“evidence which in the absence of any credible contradictory evidence by the employer would lead any reasonable person to conclude that discrimination had occurred.”*

The Northern Ireland Court of Appeal, in an employment discrimination case, stated that:

*“Once the evidential burden has shifted, the question then is whether there is any evidence to justify the conclusion that the evidential burden has been discharged by the respondent.”*⁶

In article 4 of the *EC Burden of Proof Directive (Council Directive 97/80/EC)* the following definition appears: *“when persons who consider themselves wronged..... establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination”*.

In *Teresa Mitchell v Southern Health Board, (DEE011, 15.02.01)*, the Labour Court interpreted article 4 of the EC Burden of Proof Directive as follows: *“ This indicates*

⁵ *Conlon v. University of Limerick [1999] ILRM 131*

⁶ *Wallace v. South Eastern Education and Library Board (NI Court of Appeal) 1980 IRLR 193*

that a claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination. It is only if those primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there was no infringement of the principle of equal treatment. Applied to the present case, this approach means that the appellant must first prove as fact one or more of the assertions on which her complaint of discrimination is based. "

I am now going to examine the issues I have identified above and consider whether the complainants have established a *prima facie* case.

5.3 Issue of Traveller Identity

In the Equal Status Act, 2000 the Traveller community ground is defined as follows: "*means the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland*".

I am satisfied that the complainants are Travellers as defined by the Act. I am also satisfied that the complainants' Traveller identity would have been known to the respondent at the time he refused them service.

5.4 Circumstances of Refusal of Service

The next issue for decision is in what circumstances were the complainants refused service and whether the treatment afforded to them on 4 January was less favourable treatment than a non-Traveller would have received in similar circumstances. It was agreed by both parties that the complainants were refused service on 4 January, 2001 but the reason for the refusal is in dispute. The complainants' case is that they were refused service for no good reason and they believe this occurred because they are members of the Traveller community. I note the complainants said that they had never been in the pub previously nor had they ever stopped in the town of Drumcollogher. They submitted that Mr. Leahy was rude to them, refused to give them a reason for not serving them and refused to allow them use the telephone. I note Mr. Leahy agreed he gave them no reason for refusal of service on the day, but

said in evidence that he refused to serve them because they didn't act normally when they came into the pub and he believed there was a threat of violence. Mr. Leahy produced no evidence that the complainants misbehaved in any way when they entered the pub on 4 January. I do not accept that there was anything unusual or threatening in manner in which both the complainants entered the bar or approached the counter to seek service and there appears to have been other reasons behind the decision to refuse service.

5.5 I note that there was one other customer, who was not a Traveller, in the bar and he was

having a drink and there appears to have been no question of him having been refused a drink. I am satisfied therefore that the complainants, have established they were treated less favourably than non-Traveller customers in similar circumstances. I find, on the evidence before me, that the complainants have established a prima facie case of discrimination.

Rebuttal of Prima Facie Case

5.6 As I have stated above once a *prima facie* case has been established the burden of proof

falls to the respondent to rebut the presumption of discrimination and to show that the refusal of service was for reasons other than the fact the complainants are members of the Traveller community. Mr. Leahy denied that he discriminated against the complainants and gave the following reasons for refusing service:

1) he thought the complainants were involved in a riot in Drumcollogher during a festival in July, 2000

2) the complainants did not act 'normally' when they entered the pub and he was

afraid that there may be other people outside the door.

I note that Mr. Leahy was unable to say if either of the complainants took part in the riot. The only Travellers Mr. Leahy could associate with the riot were male Travellers. I note Mr. Leahy did not see the complainants on the day of the riot nor has he produced any evidence that they were in Drumcollogher that day. I find that the

respondent has produced no valid reason for holding the belief the complainants were involved in a riot.

5.7 Mr Leahy's representative argued that he exercised correct judgement in refusing the complainants because of the threat of unruly conduct and a fear of a repetition of the July incident.

I am now going to consider Section 15(1) and 15(2) of the Equal Status Act, 2000, to see if the respondent was entitled to invoke either of these Sections. Section 15(1) provides that:

“nothing in this Act prohibiting discrimination shall be construed as requiring a person to provide services in circumstances which would lead a reasonable individual having the responsibility, knowledge and experience of the person to the belief, on grounds other than the discriminatory grounds, that the provision of the services to the customer would produce a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the services are sought.”

To invoke this Section the respondent must show that there was a substantial risk of criminal or disorderly conduct or behaviour if the complainants were to be served. While the respondent has referred to an incident at the festival involving Travellers, in this case as I have stated above he has failed to provide any evidence to convince me that the complainants had ever been involved in disorderly conduct. I find no evidence to support a contention that there was *substantial risk of criminal or disorderly conduct or behaviour* if the complainants were served on 4 January, 2001, or that a refusal of service under Section 15(1) of the Equal Status Act would be justified in the circumstances. I believe that when Mr. Leahy saw the complainants, he immediately recognised them as Travellers and associated them in his mind with the incident at the festival in July, 2000. I am of the view that Mr. Leahy assumed that all Travellers would behave in a similar fashion to the behaviour at July festival, an assumption which is not deserved under any circumstances and is very unfair to members of the Traveller community. It raises the question of whether non-Travellers would be treated in a similar manner. If some non-Travellers were involved in a riot in the town would Mr. Leahy subsequently refuse to serve all non-Travellers? Clearly the answer to this question is no. I find that the fear of disorderly conduct, based purely on the

fact the complainants are Travellers, is completely unfounded and is solely attributable to Mr. Leahy's personal prejudices towards Travellers.

The licensing laws require publicans to keep an orderly house and Section 15 (2) of the Equal Status Act, 2000 provides that:

“Action taken in good faith by or on behalf of the holder of a licence or other authorisation which permits the sale of intoxicating liquor, for the sole purpose of ensuring compliance with the provisions of the Licensing Acts, 1833 to 1999, shall not constitute discrimination.”

This test doesn't require a substantial degree of risk, so the test under this Section is less severe but I am of the view that the respondent has not passed it on this occasion. Mr. Leahy provided no evidence to support his contention that there was likely to be a breach of the Licensing Act if he served the complainants. As I have found above it would appear that Mr. Leahy's decision making was influenced by his personal prejudices towards Travellers. I am not satisfied therefore that the decision of the respondent to refuse service to the complainants was taken in good faith.

5.8 The other reason Mr Leahy gave for refusing the complainant was that they did not
'act

normal' when they visited the pub, they both hesitated when the came and then they both approached the counter unlike what normal customers usually do. I note Mr. Leahy was suspicious that there were other people outside the door when the complainants entered the bar, but he provided no evidence to substantiate this belief other than to say the complainants did not act normally when they entered the bar. Mr Leahy then went on to say during his evidence that "they were not normal people." I find that this statement by Mr. Leahy was highly insulting to the complainants, that it demonstrates that he holds a highly prejudicial attitude towards Travellers. This attitude is not acceptable and should not be tolerated in this society.

I find that the only reason the complainants were refused service was because they are Travellers. I find that the respondent has failed to rebut the prima facie case of discrimination raised by them and that he did unlawfully discriminate against them on 4 January, 2001, when they were refused service.

6. Decision

Under section 27(1) of the Equal Status Act, 2000 redress may be ordered where a finding is in favour of the complainant. Section 27(1) provides that:

“the types of redress for which a decision of the Director under section 25 may provide are either or both of the following as may be appropriate in the circumstances:

(a) an order for compensation for the effects of the discrimination;

or

(b) an order that a person or persons specified in the order take a course of action which is so specified.”

Under the above Section the maximum amount of compensation I can award is €6,349 (£5,000). I order Mr. Liam Leahy, to pay to the complainants, Mrs. Nora Quilligan and Mrs. Margaret O’Brien, the sum of €2,000 each to compensate them for the distress and embarrassment suffered as well as the loss of the amenity to them.

Under Section 27(1)(b) of the Act I order the respondent to put in place a clear and transparent code of practice which should apply to all customers within 2 months of the date of this decision. The code should include the rules which apply to all customers seeking service, the code of behaviour expected from customers and the redress which may apply in the event of a breach. All the staff and customers should be informed in an appropriate manner of the contents of the code.

I also order that Mr. Leahy put in place immediately in a prominent position in the bar a notice stating that “The owner of this pub is committed to treating people in accordance with the terms of the Equal Status Act, 2000”.

Marian Duffy
Equality Officer
21 March, 2002

